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Supreme Court of the United States

October Term, 1940.

No. 657

WILLIAM J. BRENNAN,

Petitioner,

AGAINST

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

WILLIAM PAUL ALLEN,
Counsel for Petitioner.

EUGENE P. FITZPATRICK,
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WILLIAM J. BRENNAN,
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No. .....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioner, William J. Brennan, respectfully shows to the court:

The petitioner seeks a review of a decision of the Circuit Court of Appeals for the Second Circuit rendered November 18, 1940, which reversed a judgment for $25,298.75 of the United States District Court for the Eastern District of New York entered May 8, 1940 in favor of the petitioner against the respondent as damages for personal injuries sustained by the petitioner, and remanded the cause to the District Court with directions to dismiss the complaint.

Statement of the Case.

The petitioner, fifty-three years of age, was on October 7, 1937 employed by respondent as head brakeman on a freight train containing interstate cars. He had had thirty-seven years experience as a railroad employee (R. 24, 25).

The train, bound east, was hauled by two engines and as it came to Etna, Pennsylvania, consisted of fifteen freight cars (R. 27). At Etna three cars next to the engines were to be backed into a siding running west on the south side of the east bound track and placed in a storage yard (R. 28).

The two forward or easterly cars were hopper cars, each 34 feet long loaded with limestone, the third or westerly car was a gondola or flat-bottomed car 46 feet long loaded with fire clay (R. 28, 107).

There was practically no grade on the main track or the siding (R. 197). The night was clear and the tracks dry (R. 28).

At about 2:15 A. M. as the head engine on which the plaintiff was riding (R. 27) was opposite a derail on the south track of the siding (R. 23) which was 177 feet west from the switch point (R. 367) the petitioner got off the engine and walked south to the derail (R. 33).

The derail apparatus (see photographs Defendant's Exhibits A, B, L and M— R. 622, 627) consisted of a metal block weighing about 84 pounds, a lever, a target holding a light, a connecting rod, and certain mechanism designed to place the block on and remove it from the rail (R. 30). Its purpose was to hold cars on the siding and derail them if they should accidentally start and prevent their running out on the main track (R. 35).

When the petitioner came to the derail he found the lever as usual inclined 45 degrees to the east (R. 34). He unlocked the padlock on the lever, threw the lever from east to west as far as it could go, 45 degrees to the

west (R. 35), and put the padlock in the hasp (R. 39). He threw the derail in the same manner as he had thrown it on many other occasions, he felt the target revolving, felt the weight as though the derail went over and heard the noise of metal going down into the socket between the rails (R. 36, 37).

Meanwhile, the train had pulled up so that the engines were about at the switch point and the west end of the third car opposite the derail. The petitioner cut the train so as to detach the first three cars. He then mounted the stirrup on the west end of the south side of the third car from the engine, the gondola, and at his signal the engineers pulled the three cars eastward so that the last car was about one-half a car length east of the switch point. The petitioner alighted, threw the switch, gave the engineers a signal to back down and as the gondola car came past him got upon the stirrup at its west end (R. 40, 41).

The petitioner testified that the cars came along the siding at about three or four miles an hour (R. 42) and should have been stopped within a couple of feet (R. 45).

When the west end of the gondola car was at or near the derail, having thus traveled about 200 feet (R. 367, 107) there was jolt (R. 45). The petitioner immediately with his lantern signaled the engineers to stop (R. 43), but the cars kept on moving, a distance of about 63 feet (R. 359, 386). The west truck of the gondola car went off the track, the east truck of that car went off and the west truck of the second car went off (R. 338, 484). The gondola car toppled over toward a ditch three or four feet deep (R. 93) and an embankment at the south of the siding, and caught the petitioner beneath it, pinning down his body up to his shoulders against the embankment (R. 48).

Scott, petitioner's witness, an engineer of nineteen years experience (R. 193) testified that the cars should have been stopped within about eight feet (R. 210-212).

Ogden and Taylor, the engineers, respondent's witnesses, testified that the cars were going at eight to ten miles an hour (R. 330, 372), but it is improbable if not incredible that that speed could have been attained in 200 feet. McDonald, respondent's witness, a conductor who pulled out of the siding the previous afternoon, went at three or four miles an hour (R. 516).

Respondent's witnesses said that after the accident the derail block was found on top of the rail (R. 339, 347, 377), with wheel markings on it and the east end bent up (R. 341, 360, 377, 381, 449). Engineer Ogden first testified that he found the lever at 45 degrees to the west or "half cocked" which was as the petitioner said he had left it (R. 341, 342, 346, 347). Later he changed his testimony saying it was 45 degrees to the east (R. 556). Engineer Taylor in a statement made the day of the accident said the lever was "half cocked" without specifying on which side (R. 651, Ex. K). The trial judge in his opinion on the motion to set aside particularly adverted to these statements as to the lever (R. 669). The derail apparatus was received in evidence and was operated before the jury by various witnesses (R. 325, 471) but parts of it had been in use for over two years from the time of the accident until shortly before the time of trial (R. 477). Though the respondent called various experts there was no attempt to explain by testimony the workings of the derail apparatus.

The petitioner was seriously and permanently injured.

The trial court charged the jury that if the derail was off the track "then there is an inference that follows from that fact if the accident thereafter happened with the derail off the track" (R. 598) and the respondent excepted (R. 607). The court also charged that the last clear chance doctrine might be applicable (R. 599, 600) and the defendant excepted (R. 608).

The jury rendered a verdict for $40,000. The trial judge entertained motions to set aside the verdict on the

question of excessiveness and the weight of evidence (R. 611). He wrote an opinion (R. 669-671) holding that there was a question of fact for the jury as to whether or not the respondent had exercised due care to furnish safe equipment, but ruled that he would set aside the verdict as excessive unless the plaintiff stipulated to reduce it to $25,000. The stipulation was made and judgment was entered accordingly (R. 672).

The Circuit Court of Appeals in an opinion held that the plaintiff's testimony that he threw the lever and moved the block off the rail to set it down in the socket was "so refuted by physical circumstances that there was no debatable question but that the initial cause of the accident was solely the failure of the plaintiff" to remove the derail block from the rail and that the last clear chance doctrine was not applicable and remanded the cause with instructions to dismiss the complaint.

Opinions in the Courts Below.

The opinion of the District Court is reported in 33 Fed. Supp. at page 158 and appears at page 669 of the record.

The opinion of the Circuit Court of Appeals is not yet officially reported.

Jurisdiction.

This court has jurisdiction to entertain the petition and grant the writ under Section 347 (a) of title 28 of the United States Code Annotated.

Questions Presented.

The petitioner asserts that the following questions are presented in the cause:

First, whether the Circuit Court of Appeals erred in holding that the last clear chance doctrine was not applicable to the stopping of the cars.

Second, whether the Circuit Court of Appeals erred in holding that it was not for the jury to determine whether the derailment was caused by respondent's negligence.

Reasons Relied on for the Allowance of the Writ.

I.

The trial court properly left the issue of last clear chance to the jury and the Circuit Court of Appeals in contravention of holdings of this court erred in holding that this issue was not for the jury.

The jury was justified in finding that the cars were moving along the siding at from three to four miles an hour and could have been stopped within eight feet and that immediately the west truck of the gondola car went off the rails the engineers, as they admit, became aware of this by the jolt. The petitioner testifies, additionally, that he gave the stop signal. It is undisputed that after this notice and warning the gondola car went 63 feet from the derail (R. 359, 386) both trucks left the track and it ultimately toppled over, pinning the plaintiff underneath it. If the engineers had been alert and applied the brakes promptly, the cars could have been stopped within eight feet, and there would have been no tragedy. It was for the jury to say whether the engineers should have stopped the train before the gondola toppled over and that issue was properly submitted to the jury.

The opinion of the Circuit Court of Appeals says that it was shown without dispute that brakes "could not reach their maximum efficiency for 4.4 seconds after being applied in normal circumstances". This statement is apparently based upon testimony of respondent's employee

Dotson, of course an interested witness, as to an alleged experiment (R. 526) made with the two engines, and three freight cars, two and a half years after the accident (R. 518). As the petitioner pointed out by objection, which was overruled (R. 520, 532) there was no evidence that the cars and loads were the same at the time of the experiment as at the time of the accident, and it affirmatively appeared that the cars were not (see R. 28, 106, 533) and there was no evidence that the brakes and other equipment and state of repair of the engines were the same at both times. Certainly the engines were two and a half years older. Further, the experiment was made, the court says, in "normal circumstances". The accident was in anything but "normal circumstances". The derailed cars were bumping over the ties and the dirt, which made it far easier to stop them than if they had been running "normally" over clear unobstructed rails (R. 532). The experiment and its results had no probative value.

Upon these facts, it was error for the Circuit Court of Appeals to hold as a matter of law there was no substantial evidence for the jury.

This court has repeatedly held that cases ought not lightly be taken from juries.

> *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43;
> *Pythias Knights' Supreme Lodge* v. *Beck*, 181 U. S. 50;
> *Marande* v. *Texas and Pacific Railway Co.*, 184 U. S. 174.

> "If fair minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, and to be settled by the jury under proper instructions."

McDermott v. *Severe*, 202 U. S. 600, 604;
Davidson Steamship Co. v. *United States*, 205 U. S. 187.

Even if the plaintiff was in a position exposed to danger, by reason of his own fault "and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

Chunn v. *City and Suburban Railway of Washington*, 207 U. S. 302, 309.

The decisions cited by the learned Circuit Court of Appeals on this branch of the case are not here applicable.

In *Gunning* v. *Cooley*, 281 U. S. 90, this court, while discussing the scintilla evidence rule, sustained a verdict for plaintiff, and at page 94, said:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. (Citing cases.)"

In *Southern Railway Co.* v. *Walters*, 284 U. S. 190, a crossing case, the testimony of plaintiff's witnesses was negatived by the undisputed physical facts and five disinterested witnesses.

In *St. Louis Southwestern Railway Co.* v. *Simpson*, 286 U. S. 346, asserted negligence against the railroad com-

pany was predicated upon failure of a conductor to give warning to an admittedly negligent engineer not to take his train out upon the main track when the conductor had not yet, using due diligence, read the orders which were to hold up the train. At the time the engineer pulled out the peril was not perceived and understood by the conductor (*Woloszynowski* v. *New York Central Railroad Co.*, 254 N. Y. 206; *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558). Here the peril was perceived and understood immediately. The engineers admit they knew by the jolt that the car had left the track. The petitioner testified that he immediately gave the stop signal with his lantern.

II.

The trial court properly submitted to the jury the question of the cause of derailment and the Circuit Court of Appeals erred in holding that the question was not for the jury.

The petitioner testified that he properly threw the derail and felt and heard it go into the metal socket between the rails. He was in part corroborated by the testimony of the respondent's witnesses, Ogden and Taylor, as pointed out by the trial judge in his opinion on the motion to set aside the verdict (R. 670), that shortly after the accident the derail lever was pointed toward the west which would have indicated that the derail was in its socket. Though the respondent produced the derail apparatus in court and called various engineers, no one explained the mechanics by which it operated and no evidence was produced to show the nature and functioning of the mechanism that directs and controls the movement of the block.

The happening being of a nature which would not ordinarily have occurred except there was fault, the *res ipsa loquitur* doctrine applied.

Inland & Seaboard Coasting Co. v. *Tolson,* 139 U. S. 551;
Southern Ry. Carolina Division v. *Bennett,* 233 U. S. 80;
Minneapolis & St. L. R. Co. v. *Gotshall,* 244 U. S. 66;
Lowery v. *Hocking Valley Ry. Co.,* 60 F. (2d) 78;
Cochran v. *Pittsburgh & L. E. R. Co.,* 31 F. (2nd) 769;
Erie R. Co. v. *Murphy,* 9 F. (2d) 525;
Central R. of N. J. v. *Peluso,* 286 Fed. 661.

The entire evidence raised a question of fact for the jury as to whether the negligence of the defendant caused the derailment of the draft.

III.

The Writ of Certiorari Should Be Granted.

December 27, 1940.

WILLIAM PAUL ALLEN,
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EDWARD H. WILSON,
Of Counsel.

Office - Supreme Court, U. S.
FILED
JAN 23 1941
CHARLES ELMORE CROPLEY
CLERK

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No. 657

WILLIAM J. BRENNAN,

Petitioner,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HAROLD R. OAKES,
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Supreme Court of the United States

OCTOBER TERM, 1940

WILLIAM J. BRENNAN, *Petitioner,* *against* THE BALTIMORE AND OHIO RAILROAD COMPANY, *Respondent.*	No. 657

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The questions presented by the petitioner do not merit review, as they are not of peculiar nature nor general importance, and the decision of the Circuit Court of Appeals is not in conflict with the applicable decisions of other Circuit Courts of Appeals nor of this Court.

Facts

The facts are mainly stated in the unanimous opinion of the Circuit Court of Appeals, reported in 115 F. (2d) 555.

In the absence of the conductor and flagman (R. 197), it was the duty of petitioner to remove the derail block from the passing siding (R. 201) and determine if the track

was clear for a safe movement (R. 210). It was his duty to light the lamp in the target of the derail "at the first opportunity" (R. 202), which he did not do (R. 207). While riding the cars back into the siding, it was his duty to watch ahead upon the track and to signal the engineers when to stop (R. 126, 209). It was his duty to *know* that the derail block was off the rail (R. 222), but he did not look to see if it was (R. 114). As there was no light in the target, the engineers were dependent upon petitioner to direct a safe movement onto the passing siding (R. 221).

Aside from the convincing physical circumstances of the condition and position of the derail apparatus following the accident, the petitioner's testimony was so uncertain and his admissions so numerous, as to leave no doubt that the derailment was due solely to the omission of his admitted duties. He testified that when he moved the derail lever from east to west, he "felt as though the derail went over, and heard it going over" (R. 106). He felt the weight of the block as soon as the lever started to go and heard the noise of the derail block going into the socket, when the lever was "pretty nearly half way across" (R. 379). Demonstrations with the derail before the Trial Court and jury clearly indicated that the block will not drop into position off the rail until the lever is forced to the left of the target (R. 1418-1421). Petitioner saw nothing wrong with the track and nothing wrong with the derail, with the exception of the light being out (R. 219). Twenty days after the accident, the petitioner made a statement (R. 790), in which he said: "I thought I did throw the derail, * * * and we just backed in, and we just went off of the derail" (R. 1925); upon being asked when he discovered that he had not thrown the derail, he replied: "When I hit it." and "Yes; I figured maybe I didn't get it over or something;" (R. 1928). He

stated that he didn't know whether he had the derail clear off or not and said: "I pulled the lever; whether I got it off and it went back or not I couldn't say" (R. 1930). The petitioner did not deny the making of the statement in the presence of three people (R. 260), but to questions regarding seeing and talking to them, he responded "not that I remember of," and "not that I know of" (R. 256-260). In a bill of particulars, made twenty months after the accident and bearing the signature of petitioner's attorney (R. 334), it was pleaded that "although the plaintiff threw the lever governing the movement of the said derail in the usual and customary manner to throw the said derail off the said track, the said derail was not removed from said track or rail;" (R. 341). Four months later and two days before the first trial of the action, an amended bill of particulars was served (R. 335, 336), in which it was pleaded that "although the plaintiff threw the lever governing the movement of the said derail in the usual and customary manner to throw the said derail off the said track, the car on which plaintiff was riding in said train was derailed and turned over upon the plaintiff;" (R. 343). Obviously, this amendment was designed to avoid the effect of plaintiff's omissions, and to invoke the rule of *res ipsa loquitur*.

It was undisputed that following the accident, the derail block was found resting in its normal position on top of the rail, as shown by Exhibits B, L and M, with fresh cuts on its bright red surface (R. 1021, 1131, 1174, 1270, 1359, 1687), starting on the gauge line where the flanges of wheels run inside the rail and sliding off the center of block to outside of rail (R. 1500), as shown by Exhibits L and M and the Physical Exhibit N. The movement of the block is at right angles to the rails. When the derail rests in its guide block between the rails, no force applied along the track can

move the derail block transversely to replace it upon the rail (R. 1483), according to all known laws of motion (R.1725).

In his previous statement, petitioner said he supposed the train was backing at about six miles an hour (R. 1938). He testified the speed was about 3 or 4 miles an hour (R. 126, 321). The engineers said the train was backing between 8 and 10 miles an hour (R. 989, 1115). The petitioner said the car on which he was riding went about two car lengths from the time it went off the track (R. 270). The elapsed time he estimated at about ten seconds (R. 268). The part of the train derailed was actually one and one half cars, 63 feet (R. 1077). The petitioner said that after he gave a signal to stop and the brakes were applied, the two engines and three cars should have been stopped in a couple of feet (R. 368). A former engineer of the Pennsylvania Railroad said the stop should have been made in 3 to 4 feet (R. 585), about a revolution of a wheel of 3 feet in diameter, after the stop signal was received (R. 586, 627-632). It was undisputed that it would take 4.4 seconds for the brakes on the head engine to attain maximum efficiency in an emergency application and about .5 of a second additional for each car in the train (R. 1627, 1628). According to standard tables, an object moving at a speed of 4 miles an hour will travel 58.7 feet in ten seconds (R. 1711). The Circuit Court of Appeals held that the opinions of petitioner and his witness did not arise above the level of mere speculation.

I

The doctrine of last clear chance is not applicable.

The decisions are substantially uniform that before this doctrine may be invoked, certain essential factors must be drawn from the testimony. In this case, the respondent

submits that in order to apply the doctrine, it should have appeared that:

1. The negligence of the petitioner had ceased, and thereafter,

2. The engineers became aware of his peril, and

3. In time for them to have stopped the train and avoided his injuries, and

4. It be substantially proven that the engineers had failed to stop within the time necessary following their knowledge.

Chunn v. *City and Suburban Railway of Washington*, 207 U. S. 302, 309;
Southern Railway Company v. *Gray*, 241 U. S. 333, 339;
St. Louis Southwestern Railway Company v. *Simpson*, 286 U. S. 346, 350, 351;
Walker v. *East St. Louis & S. Ry. Co.* (C. C. A. 8), 25 F. (2d) 579;
Woloszynowski v. *New York Cent. R. Co.*, 254 N. Y. 206;
Kansas City Southern Railway Company v. *Ellzey*, 275 U. S. 236, 241;
Iowa Cent. Ry. Co. v. *Walker*, 203 F. 685;
Pennsylvania R. Co. v. *Swartzel* (C. C. A. 7), 17 F. (2d) 869;
Jerrell v. *New York Cent. R. Co.* (C. C. A. 2), 68 F. (2d) 856, cert. denied 292 U. S. 646.

The essential factors for the application of the doctrine are missing from the record. Whether the engineers received a stop signal from the petitioner after the car on

which he was riding left the rails (R. 128), or learned of the derailment through the vibration of the engines (R. 993, 1119), it is undisputed that the lead engineer immediately shut off his throttle and applied the brakes in emergency (R. 993), while the second engineer shut off the throttle and used his independent brake (R. 1120). The petitioner was carried approximately 63 feet beyond the derail (R. 1077), in ten seconds (R. 268). Of this time, it is undisputed that approximately 6.4 seconds were consumed in the release of the air from the train line connecting the two engines and three cars. This left only a minimum space of time for the engineers to comprehend an unexpected occurrence and for the brakes to check the momentum of a train 250 feet in length (R. 320) and weighing 923,400 pounds (R. 317-318). Subsequent tests established that a similar train could not make an anticipated stop upon the rails at the same place in less than 77 feet with the brakes applied at five miles per hour (R. 1584) or in less than 130 feet when the brakes were applied at ten miles an hour (R. 1589). Against such testimony, the assertions of the petitioner that the stop should have been made in a couple of feet (R. 368) and of an ex-engineer unfamiliar with the train or location that the stop should have been made in the revolution of a wheel, afford only speculation and conjecture and do not warrant submission to a jury.

Gunning v. *Cooley*, 281 U. S. 90;
Gulf, Mobile & Northern Railroad Co. v. *Wells*, 275 U. S. 455;
Chicago, Milwaukee & St. P. Ry. v. *Coogan*, 271 U. S. 472;
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Pennsylvania Railroad Company v. *Chamberlin*, 288 U. S. 333.

II

There was no question for the jury as to the cause of derailment, as the physical facts and credible testimony clearly showed the sole fault was that of petitioner.

The operation of the derail and the guidance of the train were exclusively in the hands of petitioner. There was no evidence of any defect; in fact the petitioner found the derail in good working order and it operated properly both before and after the accident (R. 1546, 1510, 1400). The petitioner at no time stated unequivocally that he removed the derail from the rail. After the accident, it was found upon the rail (R. 1021, 1131, 1174, 1270, 1359, 1687). It had been recently run over and there was no other apparent cause for the derailment. It could only rest upon the rail if the petitioner left it there (R. 1483, 1725). The physical control of the derail rested solely with the petitioner. If the sole cause of the derailment was the act or omission of the petitioner, he cannot recover under the Federal Employers' Liability Act.

Davis v. *Kennedy,* 266 U. S. 147;
Frese v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1;
Great Northern Railway Company v. *Wiles,* 240 U. S. 444;
Sheehan v. *New York, N. H. & H. R. Co.,* 93 F. (2d) 442, cert. denied 304 U. S. 560.

Where the initial cause of the accident is the failure of the injured to perform his duty, the rule of *res ipsa loquitur* does not apply. The plaintiff must prove the negli-

gence of the defendant and that the negligence complained of caused his injuries.

Great Northern Railway Company v. *Wiles,* 240 U. S. 444;
Patton v. *Texas & Pacific Railway Company,* 179 U. S. 658;
Atchison, Topeka & Santa Fe Railway Company v. *Toops,* 281 U. S. 351;
New York Central Railroad Company v. *Ambrose,* 280 U. S. 486;
New Orleans & Northeastern Railroad Company v. *Harris,* 247 U. S. 367;
Minneapolis & St. Louis Railroad Company v. *Gotschall,* 244 U. S. 66, 67.

The testimony of the petitioner that he threw the derail lever in the usual manner was contrary to all physical facts and scientific principles. Where the latter are proven without contradiction, as in this case, it is proper to set aside a plaintiff's verdict and under the new rule (F. R. C. P. 50[b]) direct a dismissal of the complaint.

Redman v. *Baltimore & Carolina Line, Inc.,* 70 F. (2d) 635, 637;
Jacobson v. *Chicago, M., St. P. & P. R. Co.,* 66 F. (2d) 688;
Liggett & Myers Tobacco Co. v. *DeParcq,* 66 F. (2d) 678.

III

Writ of certiorari should be denied.

HAROLD R. OAKES,
Counsel for Respondent.

January 21, 1941.